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No. 83-1225

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NORMAN E. WYMBS, *et al.*,

Petitioners,

v.

REPUBLICAN STATE EXECUTIVE COMMITTEE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

A rule of the National Republican Party, which is reflected at the state level in a rule of the Florida Republican Party, provides for the selection of three delegates to the Republican National Convention from each congressional district.

The question presented is whether a suit by members of the Florida Republican Executive Committee, naming only that state committee and not the Republican National Committee as a defendant and asserting that the state party rule results in a denial of the equal protection of the laws because the number of registered Republicans varies from one Florida congressional district to another, is justiciable.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The original opinion of the district court and its opinion on remand are not reported. The opinion on remand is reproduced in the appendix to the petition, pages A15-A39. The first opinion of the court of appeals is reported at 658 F.2d 324. The court of appeals' opinion accompanying the decision of which review is requested (Pet. App. A40-A84) is reported at 719 F.2d 1072.

STATEMENT

This suit was instituted by three members of the Republican State Executive Committee of Florida who assert that the equal protection clause of the Fourteenth Amendment forbids that committee to select three delegates to the quadrennial Republican National Convention from each congressional dis-

trict in Florida. The Executive Committee is the only defendant named in the complaint.[1]

The Pertinent Party Rules

Petitioners' challenge is to Rule 11, § 4(b), of the Florida Republican Party's Rules of Procedure (Pet. App. A10- A11). That state rule, however, merely implements one part of the rules of the National Republican Party that allocate National Convention delegates among and within the states and territories.[2] The pertinent rules of the National Republican Party granted to Florida 51 delegates to the 1980 National Convention and, because of reapportionment following the 1980 census and Florida's performance in the 1980 election, grant Florida 82 delegates to the 1984 convention. Of the respective totals, 45 were selected in 1980 and 57 will be selected in 1984 under National Party Rule 30.A.2,[3] which calls for "three . . . district delegates from the district of each

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[1] Petitioners' complaint also challenged the composition of the Executive Committee itself as a denial of equal protection. They asserted that, unless reconstituted, the committee could not constitutionally exercise several of its functions, such as adopting rules for selecting National Convention delegates and filling vacancies on the ballot for state offices, because its membership consists of two persons from each county in Florida and the counties have differing numbers of registered Republicans. The court below rejected this challenge (Pet. App. A71-A84), and the issue is not pressed in the petition.

[2] State Party Rule 11 in terms speaks only to the selection of delegates to the 1980 Republican National Convention. Since the ruling below, the respondent Executive Committee has adopted a rule for the 1984 National Convention consonant with the National Party's rules and therefore in the same pattern as Rule 11.

[3] National Party Rule 30 traces back to a rule adopted at the 1972 Republican National Convention and reenacted at the 1976 and 1980 conventions.

Representative in the United States House of Representatives." (Pet. App. A85.)[4]

The rules of the National Republican Party allow the selection of National Convention delegates by primary election, by district or state convention, or by the Republican state committee. By its rules, the Florida Republican State Executive Committee has chosen to follow the results of the Florida preference primary provided for by state law, Fla. Stat. Ann. § 103.101 (Pet. App. A1-A6), in selecting its National Convention delegates. Rule 11, §§ 1, 2 (Pet. App. A10). Only registered Republicans can vote on the Republican side of the Florida primary, only registered Democrats on the Democratic side. Fla. Stat. Ann. § 101.021.

The state party's rules award the at-large delegates to the "Republican presidential candidate receiving the higher or highest number of statewide votes" in the primary. Rule 11, § 2 (Pet. App. A10). The delegates from each congressional district are awarded to the presidential candidate receiving the most primary votes in that district. *Id.* The people who serve as delegates are selected after the primary, in part from lists provided to by the presidential candidates' organizations. *Id.* § 3 (Pet. App. A10-A11). The at-large delegates are selected by the full State Executive Committee, and the congressional district delegates are "elected by a majority vote of the total respective state committeemen, state committeewomen and county chairmen representing any county in each congressional district . . . ." *Id.* § 4(b) (Pet. App. A11).

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[4] Florida had 15 congressional districts in 1980 and now has 19. There were in addition in 1980 six at-large delegates under National Party Rule 30.A.1 (Pet. App. A85), and there are for the 1984 convention those six and nineteen bonus delegates that result from the success of the Republican ticket in Florida in the 1980 election, National Party Rule 30.A.4 (*id.* at A85-A86).

History Of The Litigation

This case was instituted in January 1980. The theory of the complaint was that, because the number of registered Republicans varies from one congressional district to another, the plaintiffs, residents of one of the districts with a larger than average Republican registration, were denied the equal protection of the laws in the selection of National Convention delegates. No state official who administers the state election law was named a defendant. Nor was the Republican National Committee. The State Executive Committee was alleged to be engaging in state action in promulgating Rule 11 and selecting convention delegates according to the preferential primary returns.

On July 1, 1980, the district court granted petitioners' motion for summary judgment. The court held that the Fourteenth Amendment imposes a "one-Republican, one-vote" rule in allocating convention delegates within a state on the basis of a presidential preference primary and therefore forbids the state party to follow the national party rule by selecting three delegates from each congressional district. The court suspended the operation of its injunction until after the 1980 Republican National Convention. The Court of Appeals for the Fifth Circuit vacated that judgment and remanded the case for reconsideration in the light of this Court's intervening ruling in *Democratic Party of the United States* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), that "[a] political party's choice among the various ways of determining the makeup of a state's delegation to the party's national convention is protected by the Constitution." *Wymbs* v. *Republican State Executive Committee of Florida*, 658 F.2d 324, 325 (5th Cir. 1981), *quoting from La Follette*, 450 U.S. at 124.

On remand, the district court again held the Florida Republican Party rule unconstitutional. (Pet. App. A15-A17, A18-A39.) On appeal, the United States Court of Appeals for the Eleventh Circuit reversed and instructed the district court to dismiss the complaint.

In the district court and on appeal the respondent Executive Committee raised a number of defenses: that it was not the state for purposes of the Fourteenth Amendment; indeed that, as a private political association, it was entitled by the First Amendment to order and manage its affairs without state or other governmental interference; and that, in any event, there could not possibly be any equal protection violation in the selection of equal numbers of National Convention delegates from districts required by Constitution and statute to be as nearly equal in population as humanly possible.

The court of appeals found it unnecessary to consider these contentions, except insofar as a political party's First Amendment freedom from governmental interference entered into its decision that there was no justiciable controversy. In a thorough and thoughtful opinion the court ruled that plaintiffs were debarred at the threshold. In presenting to the court an internal political party dispute, they had presented it with a case that was not suitable for adjudication. For one thing, the plaintiffs had not joined the Republican National Committee as a party, which meant that the district court's decree would not "provide the plaintiffs effective relief." (Pet. App. A58.) The plaintiffs had attacked only the state rule providing for three delegates from each congressional district, but, the court said, "[t]hat rule does not control what Florida delegates are admitted to the convention . . . ." (*Id.* at A71.) The court went on:

> "The National Rules control this issue, but [plaintiffs] failed to sue the Republican National Committee, thus denying the court the power to afford [them] effective relief. Besides this potentially fatal joinder problem, the strong first amendment associational freedoms possessed by political parties limited the district court's ability to tell the Republican Party how to conduct its internal affairs and whom it should represent. Finally, enforcement of a one Republican, one vote rule would pose insurmountable practical and legal problems for the district court." (*Id.*)

REASONS FOR DENYING THE WRIT

The decision below turns in substantial part on petitioners' failure to sue the right people and attack the right rule. To that extent it plainly presents no question of general importance. So far as the court's other reasons for finding petitioners' complaint nonjusticiable are concerned, they are in full accord with doctrines established by pertinent decisions of this Court. The court's decision does not conflict with any decision of any other court of appeals.

The court of appeals routinely and correctly applied the provisions of Rule 19 of the Federal Rules of Civil Procedure in finding that the Republican National Committee was a necessary party not joined. That "potentially fatal joinder problem" combined with First Amendment associational freedoms of a political party emphasized by this Court in *Democratic Party of the United States* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), and the problems of fashioning an effective decree to make plaintiffs' case unfit for adjudication by an Article III court. There is nothing in the analysis of the justiciability issue by the court below, applying standards this Court enunciated in *Baker* v. *Carr*, 369 U.S. 186 (1962), to warrant further review by this Court.

Moreover, the very great likelihood is that the justiciability issue would not be reached by this Court or would not in any event be determinative of the ultimate outcome of the lawsuit, because respondent's contentions on the merits of petitioners' equal protection claim would be accepted either here as alternative grounds for sustaining the court of appeals' judgment or on remand by that court.

1. Petitioners' position in this Court is premised, as it was below, on the mistaken view that "Florida law authorizes the [Florida] Republican State Executive Committee to adopt rules" governing the selection of delegates to the Republican National Convention. (Pet. 2.) The State of Florida neither authorizes Florida Republicans to send delegates to the quadrennial convention of the National Republican Party nor

establishes the number of delegates Florida Republicans may send or how those delegates are to be selected. These matters are governed by the rules of the National Republican Party, as adopted by the 1980 National Republican Convention, specifically Rules 30 and 31. (Pet. App. A85-A89.) These rules require that there be three delegates "from" each congressional district throughout the United States. (See *id.* at A52-A54.)

Florida Republicans may send delegates to the Republican National Convention only to the extent that the rules for the convention authorize them to do so and may select their delegates only in accordance with those rules. That point is settled by decisions of this Court, three of them, all handed down within the last 12 years: *Democratic Party of the United States* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Cousins* v. *Wigoda*, 419 U.S. 477 (1975); and *O'Brien* v. *Brown*, 409 U.S. 1 (1972). The authority for the Florida Republican Party rules is National Rules 30 and 31, not any provision of Florida law.

2. Because the Republican National Convention is the arbiter of compliance with its rules, no court could grant effective relief in this case, even if petitioners had a right to the constitutional ruling they seek. The respondent State Executive Committee is the only defendant in this case, and no effort was ever made to name another. Because the Republican National Committee is the sole representative of the national party between conventions, only an order directed against the national committee could affect the determination of who is authorized to be seated as a convention delegate. For this reason the court of appeals was incontestably correct in ruling that the district "court's injunction will have no effect on the National Convention." (Pet. App. A58.) Rule 19(a) of the Federal Rules of Civil Procedure requires the presence as a party of any person in whose "absence complete relief cannot be accorded among those already parties . . . ." It accordingly follows, as the court of appeals ruled, that petitioners' failure to sue the Republican National Committee denies the federal courts the power to "provide . . . effective relief" in this case. (Pet. App. A58.)

The petition scarcely acknowledges the role that this procedural defect in petitioners' case played in the decision below. Petitioners indicate that they would be content with a judgment affecting only the Florida delegate selection process without regard to whether the delegates selected were seated at the convention. (Pet. 8-9.) But the court of appeals was clearly right that such a judgment "would be, at best, of trifling effect." (Pet. App. A69.) It would not relieve petitioners' "real complaint." (*Id.*) Petitioners' professed willingness to accept an empty judgment does not cure the Rule 19 problem or the related Article III problem of the inability of a court in this case to enter a binding judgment (pp. 10-11, *infra*).

The routine application of Rule 19 by the court of appeals obviously presents no issue worthy of review by this Court.

3. To be sure, the court below did not pursue the "potentially fatal joinder problem" (Pet. App. A71) to its ultimate resolution because other factors combined with it to make petitioners' case unfit for judicial disposition. (*Id.* at A58, A71.) Those other factors are solidly grounded in decisions of this Court and fit within the criteria set forth in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), that the court invoked in its treatment of justiciability: it found that petitioners sought "an initial policy determination of a kind clearly for nonjudicial discretion," and that there were no "judicially discoverable and manageable standards for resolving" their complaint. (Pet. App. A61-A62.)

Because the analysis by the court below is so solidly grounded in this Court's decisions, there is no warrant for further review by this Court even apart from the presence of the plainly noncertworthy joinder issue.

a. The court concluded from its analysis that "to provide the relief [plaintiffs have] requested would require this Court to engage in political party policy making beyond its role in society and beyond our ken as article III judges" (Pet. App. A62), and that the controversy that the dissident Florida Republican plaintiffs took to court and away from their party's own open forums "is a disagreement over a pure question of

internal Republican Party policy" (*id.* at A63-A64). The court noted in support of its conclusion the words uttered by this Court concerning a similar controversy over the manner of choosing National Convention delegates just a few terms ago. The Court said then that "it is not for the courts to mediate the merits of this dispute. . . . [A] court may not constitutionally substitute its own judgment for that of the Party." *Democratic Party of the United States* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-24 (1981).

Clearly petitioners do ask for the substitution of a court's judgment for a judgment made by their party on a matter of great political moment—how the party's constituency is to be defined. The resolution of that question requires a policy determination that is solely for party members and not for judges: how best can the Republican Party further its goals and protect its interests. Those goals and interests are many in number, sometimes contradictory, and all politically sensitive. Although petitioners assert that delegates to the Republican National Convention "represent no constituency other than registered Republicans" (Pet. 8), their party has made a different judgment. The Republican Party, a minority party within the country and in Florida, has determined that it can best select a presidential nominee by having at its national conventions a solid core of delegates whose homes are spread evenly throughout the national population, three to each congressional district. This, the national party has concluded, is one of the means of enlarging the chance that the candidate the delegates nominate will win in a vote of a national population among whom Republicans are in the minority. Even if this policy had not succeeded, as it has in five of the last eight presidential elections, it would not be for the courts to second-guess it.

Furthermore, the court of appeals said, even if it had the general competence to "define the constituency of the Florida Republican Party and decide how that constituency could best be represented at the National Convention, we would be constrained by the Party's countervailing First Amendment rights of free speech and association." (Pet. App. A67.)

The *La Follette* decision, quoted just above, sustained the freedom of the Democratic Party under the First Amendment to reject a slate of delegates chosen in accordance with a state's primary election law. The "strong and time honored rights of free speech and association" (Pet. App. A67) of political parties are as proof against judicial interference as they are against the legislative interference threatened in *La Follette*. In *Cousins* v. *Wigoda*, 419 U.S. 477, 487 (1975), this Court said that a political party and its members "enjoy a constitutionally protected right of political association," and that " 'any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.' "

b. Petitioners' case also lacks the "judicially discoverable and manageable standards to resolve the controversy presented" that *Baker* v. *Carr* demands. Even if a court could authoritatively define the constituency of a Republican National Convention delegate and did so in accordance with petitioners' proposal—"all registered Republicans"—there would still be a "lack of judicially discoverable and manageable standards for" deciding how to ensure representation of that constituency. This Court has found that apportionment based even on total voter registration is suspect, in part because of the possibility of fortuitous fluctuations in the number of registered voters. *Burns* v. *Richardson*, 384 U.S. 73, 93 (1966); *see also Gaffney* v. *Cummings*, 412 U.S. 735, 746-48 (1973). Party registration, accurately described by the Court below as "very fluid" (Pet. App. A70, n.36), provides an even less secure base for apportionment. Moreover, its use would pose practical problems of constructing districts that would, in the court's considered view, prevent a court from giving effect to petitioners' "delegate selection scheme." (Pet. App. A70.)

In addition, the court below held, under the rubric of the judicial standards criterion of *Baker* v. *Carr*, that there is no way for an Article III court "to resolve the controversy" that petitioners tried to present, *i.e.*, no means of fashioning "an effective remedy." (Pet. App. A68.) The Republican National Convention, not the authorities of Florida (and not a federal

court), decides what delegates from Florida are to be seated by the Convention. Therefore, any judgment entered on petitioners' complaint would not bind the parties sought to be affected and would amount to an advisory opinion, in derogation of "the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties," *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948).[6] (Pet. App. A68-69.)

4. There is no inconsistency between the decision below, applying as we have just seen the recognized criteria of *Baker* v. *Carr*, and any other decision of this Court. The Court has consistently expressed its doubts that internal party disputes such as this one are justiciable. *O'Brien* v. *Brown*, 409 U.S. 1, 4 (1972); *Cousins* v. *Wigoda*, 419 U.S. 477, 483 n.4 (1975); *see also Republican State Central Committee of Arizona* v. *Ripon Soc'y, Inc.*, 409 U.S. 1222 (1972) (Rehnquist, J., in chambers). Most recently, in *La Follette*, the Court while deciding the case on First Amendment grounds used language of justiciability in sustaining a political party's freedom from legislative or judicial interference. (P. 9, *supra*.)

Of course, this Court sits to adjudicate the claims of political parties and their adherents that they have been denied access to the ballot, as in *Moore* v. *Ogilvie*, 394 U.S. 814 (1969), with which petitioners erroneously suggest an inconsistency (Pet. 6), and claims of disfranchisement or dilution or distortion of votes in the election of public officials, as in *Gray* v. *Sanders*, 372 U.S. 368 (1968), on which petitioners rely heavily. There is no such denial of access to the ballot or disfranchisement or its equivalent here. Of *Gray* v. *Sanders*—invalidating the use by Georgia of the infamous county unit system to determine the winner in a statewide Democratic primary that at that time was conclusive of the general election—it is enough to say that

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[6] See also Glidden Co. v. Zdanok, 370 U.S. 530, 569 (1962); United States v. Jones, 119 U.S. 477, 478 (1886); Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792).

the Court disclaimed reaching "the questions that would be presented" if a state nominating convention rather than a primary election were being used to select candidates for statewide office. 372 U.S. at 378, n.10.

Similarly, there is no conflict between the decision below and the decision of any other court of appeals. Indeed, the decision below comports precisely with the ruling of the Court of Appeals for the Eighth Circuit in *Irish* v. *Democratic-Farmer-Labor Party*, 399 F.2d 119, 121 (8th Cir. 1968), that an action complaining of malapportionment in the selection of delegates to the Democratic National Convention was nonjusticiable. Panels of the Court of Appeals for the District of Columbia Circuit some years ago entertained national party delegate disputes as justiciable,[7] but when such a dispute later came before the court *en banc*, it expressly reserved the question of justiciability thought to be resolved by the earlier panel decisions. The court said that the question was "of obvious difficulty." *Ripon Soc'y, Inc.* v. *National Republican Party*, 525 F.2d 567, 577 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976). Several judges expressed the view that the case was not justiciable. *Id.* at 592-95 (Danaher, J.); 602-04 (Tamm, J.); 609-12 (Wilkey, J.).

As for *Redfearn* v. *Delaware Republican State Committee*, 524 F.2d 1403 (3d Cir. 1975), with which petitioners claim a conflict (Pet. 6-7), the cited decision is a notation of affirmance without opinion of the judgment of a district court that did entertain and decide a delegate apportionment dispute.[*] The

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[7] Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972); Georgia v. National Democratic Party, 447 F.2d 1271 (D.C. Cir.), *cert. denied*, 404 U.S. 858 (1971).

[*] The district-court judgment affirmed at 524 F.2d 1403 is not Redfearn v. Delaware State Republican Committee, 362 F. Supp. 65 (D. Del. 1973), as indicated in the petition (p. 6, n.18), but Redfearn v. Delaware State Republican State Committee, 393 F. Supp. 372 (D. Del. 1975), a decision on remand following reversal, 502 F.2d 1123 (3d Cir. 1974), of the first-reported district-court decision.

court of appeals' decision was vacated by this Court, after certiorari had been granted, 426 U.S. 919, for further consideration in the light of intervening legislation. 429 U.S. 809 (1976).[9]

5. If the issue of the justiciability of internal political party disputes over convention delegates, their selection and seating has not been squarely decided by this Court, it is only because in every case the decision on the merits has been in favor of the freedom of the party from judicial interference. And so it would be here if the issues on the merits were presented to this Court on certiorari as alternative reasons for affirmance or to the court of appeals on remand.

a. Petitioners, who neglected to sue any state electoral official or agency, cast the Florida Republican Party in the unlikely role of the State of Florida, subject to constitutional restraints applicable only to the states and other governmental entities. The casting is unlikely because under the Constitution, as this Court has construed the First Amendment, the State of Florida must stay at arm's length or even farther from the affairs of the Republican Party; and because the Florida Republican Party is not responsible for running Florida's primary election or making the rules for it. The party has simply chosen to use the results of the election, governed by state law, as the basis for its selection of convention delegates.

b. If the Florida Republican Party were treated as the state and if the equal protection clause were applied in its full rigor to the party's selection of convention delegates, there would be no doubt that the use of equally populated congressional districts as the basis for delegate selection satisfies all the demands of equal protection. Some of the reasons why

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[9] The final entry in the log of the case is the court of appeals' vacation, without opinion, of the district court's judgment and remand to that court in accordance with this Court's direction. 547 F.2d 1163 (3d Cir. 1976).

overall population and not party registration might rationally be chosen as the criterion for allocating and selecting delegates have been mentioned in the discussion of justiciability. (Pp. ——, *supra*.) They and others were discussed in the thoughtful opinion of Judge McGowan for the en banc court in *Ripon Soc'y, Inc.* v. *National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976). In the *Ripon* case, the predecessor to the National Rule 30 that governs here was sustained against an assertion that, to comply with the equal protection clause, the Republican Party must allocate its delegates nationwide either on the basis of total population or on the basis of Republican strength. In rejecting the equal protection challenge, the court said that "a party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the *protection* of the Constitution as much if not more than its condemnation." *Id.* at 585 (emphasis in original). Some of the relevant considerations that demonstrated the rationality of the party's choice not to adhere rigidly to either population or manifested Republican strength were summarized by the court below (Pet. App. A.64, n.28):

> "In addition to promoting the party's ideology and nominating successful candidates, a party's goals may include 'rallying of voters . . . not only in an appeal to party members but to independent voters and even to members of an opposition party,' *Ripon*, 525 F.2d at 593; encouraging the participation of minorities, women and young people, id. at 583-84; and according greater weight in party decision making to 'professionals,' id. at 585, or to geographic segments of the party's constituency whose performance suggests likely success or, conversely, a need for retrenchment."

CONCLUSION

No issue is presented that warrants of review by this Court. The petition for a writ of certiorari should be denied.

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